

Insolvency proceedings: Council and European Parliament agree on common EU rules

Today, the Danish presidency of the Council and European Parliament negotiators reached a provisional agreement on an EU directive harmonising certain aspects of insolvency law. By bringing national insolvency rules closer to each other, the EU will become more attractive for investors. Currently cross-border investors have to take up to 27 different insolvency rules into account when assessing an investment opportunity in a country different than their own.

The agreement between Council and European Parliament (EP) will establish EU-wide rules on a number of key aspects of insolvency proceedings. The goals of the new, common measures are to maximise the value which creditors can recover from the insolvent company and to increase the efficiency of the insolvency proceedings. This is an important step towards more efficient and integrated European capital markets that are crucial to the EU's competitiveness.

Avoidance actions

Based on the new EU insolvency law, member states will have to apply the same (minimum) standards when it comes to taking action to prevent debtors from reducing the value that creditors can obtain following the insolvency of a company. These so-called avoidance actions challenge transactions of the debtor taken before the start of the bankruptcy procedure and, as such, protect the insolvency estate against the illegitimate removal of assets.

Tracing assets

In order to ensure that creditors can recover the maximum value from the liquidated company the Council and EP want member states to designate courts or administrative authorities that, upon request of an insolvency practitioner, can access and search national centralised bank account registers as well as bank account registers held in other member states which can be accessed through the bank account register interconnection system (BARIS) as regards information on assets that belong to the insolvency estate. This requirement comes with rules about the conditions to get access and monitoring of how the access takes place.

Insolvency practitioners will also have access to beneficial ownership registers and certain national registers and databases. Here again the goal is to improve insolvency practitioners' access, irrespective of the country they are established in.

The pre-pack proceeding

According to the agreement between the Council and the EP, a so-called pre-pack proceeding will become available in all EU member states. In a pre-pack proceeding, the sale of the debtor's business is prepared and negotiated before the formal opening of the insolvency proceedings. This makes it possible to execute the sale and obtain the proceeds shortly after opening the formal insolvency proceedings intended to liquidate a company.

The pre-pack proceeding will make it possible to automatically transfer contracts which are essential for the continuation of the business (i.e. executory contracts) from the debtor to the buyer of the business without the consent of the debtor's counterparty. However, in line with the Council's position, the new EU directive will contain a number of safeguards to protect the freedom of contract. Moreover, it is ensured that individual and collective worker's rights under union and national law are not affected.

Directors' duty

The directive will also align national rules concerning the duty of a director of a business to file for insolvency in a timely manner. This is another measure to maximise the value that creditors may be able to recover.

Directors must submit the request for the opening of insolvency proceedings within three months of becoming aware that the company is in financial distress. Following the Council position, a member state may provide that the obligation to file for insolvency is suspended if a director takes other measures to avoid damage for the creditors of a company and to ensure a level

of protection of the creditors that is equivalent to the protection provided by the duty to file for insolvency proceedings.

Creditors' committee

Another novelty of the law is that creditors' committees will, under certain circumstances, have to be set up in all member states. The law harmonises certain characteristics of the creditors' committee across member states such as its composition, the working methods of the committee as well as the personal liability of its members.

The creditors' committee can contribute to a predictable and fair distribution of the recovered value among creditors as it strengthens their position in the insolvency procedure. It ensures, for instance, the involvement of individual creditors who might otherwise, e.g. due to limited resources, or lack of geographic proximity, not participate in the proceedings.

Member states have the possibility to narrow down the establishment of the creditors' committee to large enterprises.

Enhancing transparency of national insolvency proceedings

In order to reduce the barrier of investing in another member state, EU countries will be obliged to produce a factsheet with practical information on the main features of their domestic insolvency laws.

The factsheet will be made available on the EU's e-Justice Portal in English, French and German as well as the original language (if different).

Next steps

The agreement between the Danish presidency of the EU and EP negotiators will have to be confirmed by both institutions and then be formally adopted. Member states will have two years and nine months to transpose the directive into national law.

Background

Already back in 2015, the EP, the Council, the Commission and the European Central Bank (ECB) jointly identified insolvency law as a key area for achieving a capital market union. In 2019, the IMF identified insolvency practices as one of 'the three key barriers to greater capital market integration in Europe'. And according to the European Banking Authority (2020), substantial variations in insolvency procedures between member states are reflected by differences in average recovery time which ranges from 0.6 to 7 years and in judicial costs which range between 0 to above 10%.

- [Capital markets \(background information\)](#)

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